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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN EUGENE SMITH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0608-CR-360

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0508-FA-41

June 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Kevin E. Smith appeals his convictions for Rape,¹ a class A felony, Criminal Deviate Conduct,² a class A felony, Criminal Confinement,³ a class B felony, and Sexual Battery,⁴ a class C felony. Specifically, Smith argues that the trial court committed reversible error when it took judicial notice that he violated a pretrial discovery order by failing to file a notice that he planned to raise a consent defense. Concluding that any error was harmless, we affirm the judgment of the trial court.

FACTS

M.S. lived with her grandparents and her mother in Griffith. As M.S. was walking past Smith's home on her way to a friend's house on August 15, 2005, Smith stopped her and told her that his girlfriend would give M.S. a ride if she came inside the house and waited. M.S. agreed and entered Smith's home.

Inside the home, Smith approached M.S. and asked her if she wanted to have sex. M.S. said no and pushed Smith away. M.S. attempted to exit through a door, but it was locked. At that point, Smith put a knife to M.S.'s throat and told her that "everything would be okay" if she cooperated. Tr. p. 78. After M.S. again attempted to escape, Smith pushed her into a bedroom, threw her onto the bed, and climbed on top of her. Smith began to choke M.S. when she struggled. While Smith began to take off his pants, M.S. freed herself and again tried to run. Smith threw M.S. back onto the bed and ordered her to perform fellatio on

¹ Indiana Code § 35-42-4-1.

² I.C. § 35-42-4-2.

³ I.C. § 35-42-3-3.

⁴ I.C. § 35-42-4-8.

him. When M.S. refused, Smith told her that he would force her to have anal sex if she did not cooperate. Smith then grabbed M.S.'s head and used the knife to force her head towards his penis. Smith placed his penis in M.S.'s mouth for ten to fifteen minutes. Smith subsequently removed M.S.'s pants and placed his penis in her vagina. Smith had intercourse with M.S. for five to ten minutes.

After stopping, Smith forced M.S. to take a shower and instructed her to thoroughly clean herself, and M.S. "made it look like [she cleaned herself]." Id. at 106. Smith then took M.S. back to the bedroom and allowed her to get dressed. He ordered to her lie on her stomach and tightly bound her hands and feet, causing M.S. pain. When M.S. asked Smith what he was going to do with her, he replied that he "didn't know what he was going to do with [her] yet." Id. at 113.

Smith eventually said that he was leaving and put duct tape on M.S.'s mouth. Smith left the house, but returned five minutes later. After he left again, M.S. was able to loosen the ties binding her hands and feet and escape. M.S. exited the house and flagged down a passing motorist, who called the police. A rape examination was later performed on M.S., and Smith's DNA was present in vaginal samples taken from M.S.

On August 16, 2005, Smith was charged with class A felony rape, class B felony criminal deviate conduct, class B felony criminal confinement, class C felony sexual battery, and class D felony criminal confinement. On August 23, 2005, the trial court ordered the parties to provide each other with pretrial discovery and to file written answers detailing, in

relevant part, any defenses that Smith intended to raise at trial. Appellant's App. p. 14-15. On May 4, 2006, Smith filed a notice of alibi defense.

A jury trial was held between May 22 and May 26, 2006. After the State had closed its case-in-chief, it asked the trial court to allow it to reopen its case so that the trial court could take judicial notice of the fact that Smith had not filed a notice of consent defense as required by the trial court's pretrial discovery order. Over Smith's objection, the trial court allowed the State to reopen its case, and the trial court took judicial notice of Smith's failure to file a notice of consent defense. The trial court informed the jury that

under the trial rules, the Court is permitted to take what's called judicial notice, which is to give you items that are not in dispute. Those items are items that -- that are contained in the Court's own file regarding this case. [The State] has asked me and I'm allowing [it] -- or the request is granted that I take judicial notice of a fact that's not in dispute in this case and that's the order of August 23rd, 2005. That order . . . reads as follows: [trial court reads entire order to the jury, including the section ordering Smith to respond with any defenses he intends to raise at trial].

And that ends the reading of the order dated August 23, 2005. In a discussion held outside your presence with the parties, I'll also give you judicial notice of the following: The Court is taking judicial notice that a written document on the raising of the defense of consent was not filed by the defendant. Finally, I give this admonishment. Under the rules of evidence, [Smith] has no affirmative duty to raise a defense of consent by filing a written document prior to trial.

Tr. p. 646-49. The State immediately re-rested its case.

Smith testified during the defense's case-in-chief that he had known M.S. for two years before the August 15, 2005, encounter and that they had had numerous consensual sexual encounters during those two years. Smith testified that on August 15, 2005, he and

M.S. smoked marijuana and had consensual sex but that M.S. became “upset and scared” when the condom broke while they were having sex. Id. at 667.

After the presentation of evidence, the jury found Smith guilty as charged. A sentencing hearing was held on July 7, 2006, and the trial court merged the class D felony criminal confinement conviction with the class B felony criminal confinement conviction and sentenced Smith to an aggregate term of fifty-eight years imprisonment. Smith now appeals.

DISCUSSION AND DECISION

Smith argues that the trial court committed reversible error when it allowed the State to reopen its case for the trial court to take judicial notice of Smith’s failure to file a notice of his consent defense. Facts that are judicially noticed must be generally known or capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned. Lightcap v. State, 863 N.E.2d 907, 909 (Ind. Ct. App. 2007). Indiana Rule of Evidence 201 governs judicial notice in criminal and civil trials and provides that a court can take judicial notice of any fact generally known or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned.”

While Smith first argues that the trial court “erroneously permitted the State to reopen its case for the purpose of taking judicial notice of the trial court’s [order],” appellant’s br. p. 7, Smith does not develop that argument or cite legal authority to support his contention. Thus, Smith has waived this issue by failing to make a cogent argument or provide adequate citation to authority. Bonner v. State, 776 N.E.2d 1244, 1251 (Ind. Ct. App. 2002).

While Smith concedes that the trial court's pretrial discovery order required him to list any defenses he intended to use at trial and that he did not file notice of a consent defense, Smith argues that the trial court should not have taken judicial notice of his failure to file a consent defense because "[c]onsent is not a defense to a crime of rape or criminal deviate conduct in Indiana; it is an element of the criminal offenses of rape, criminal deviate conduct, and confinement, which must be disproved by the prosecution beyond a reasonable doubt." Appellant's Br. p. 7 (citing Tyson v. Trigg, 50 F.3d 436, 444 (7th Cir. 1995) (applying Indiana law and finding that "[l]ack of consent is part of the definition of rape and must therefore be proved by the state beyond a reasonable doubt")). In other words, Smith argues that the State had the burden to prove M.S.'s lack of consent beyond a reasonable doubt; thus, the trial court should not have taken judicial notice of Smith's failure to file a notice of consent defense.

Even if we accept for argument's sake that the trial court's actions were erroneous, errors in the admission of evidence will not result in reversal if the error is harmless—i.e., if the probable impact of the evidence upon the jury is sufficiently minor so as to not affect a party's substantial rights. Cox v. State, 854 N.E.2d 1187, 1197 (Ind. Ct. App. 2006). Here, as previously detailed, the trial court read its pretrial discovery order in its entirety to the jury and notified the jury that Smith had not listed consent as a defense in his response to the order. However, the trial court immediately admonished the jury that "[u]nder the rules of evidence, [Smith] has no affirmative duty to raise a defense of consent by filing a written document prior to trial." Tr. p. 649.

It is hard to see how the trial court's actions prejudiced Smith when the trial court immediately admonished the jury that the Indiana Rules of Evidence did not require Smith to file an affirmative defense of consent prior to trial. In effect, the trial court merely told the jury that Smith had violated a pretrial discovery order but that the Rules of Evidence did not require him to file a notice of the consent defense. At trial, Smith testified about his version of the August 15, 2005, encounter, and he attested that the sexual activity with M.S. was consensual. Therefore, even assuming for argument's sake that the trial court's actions were erroneous, we cannot find them to be prejudicial. Therefore, Smith's argument fails.

Alternatively, Smith tries to expand this argument to his motion for a mistrial, which he made during the State's closing argument. During closing, the State said "[w]here are all these people that [Smith] says – stepfather – I mean, all these people he was supposedly with when this was going on, where are they?" Tr. p. 834. Smith immediately moved for a mistrial and argued that the State was trying to "shift[] the burden" to Smith to present evidence.⁵ Id.

It is well settled that a defendant cannot raise a different argument on appeal than the argument that he advanced in his objection at trial. Patton v. State, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). At trial, Smith did not move for a mistrial because the State's comment

⁵ The trial court overruled Smith's motion for a mistrial and immediately admonished the jury to

keep something in mind. It's very important in your consideration that the full burden of proof is on the State of Indiana. . . . [T]he State of Indiana carries the full burden of proof of finding [Smith] guilty beyond a reasonable doubt as to every essential elements [sic] of the crimes charged.

Tr. p. 835.

referenced the trial court's judicial notice, and he cannot now claim that that argument applies. Additionally, it is difficult to understand how the State's comment regarding the absence of additional witnesses—which seems directed at a potential alibi defense—could be understood to be an attack on Smith's consent defense and violation of the discovery order. Smith's argument to the contrary fails.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.